Date: June 4, 1997

Case No.: 96-INA-31

In the Matter of:

DR. AVTAR SINGH TINNA
Employer

On Behalf Of:

SURJIT KAUR
Alien

Appearance: Howard M. Rosengarten, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 16, 1994, Dr. Avtar Singh Tinna ("Employer") filed an application for labor certification to enable Surjit Kaur ("Alien") to fill the position of Household Indian Cook (AF 4-5). The job duties for the position are:

> Prepare Indian food for family of six. Will make Bisnats rice, Tandoor chicken, Chicken Masola, Chicken Tiki, various vegetarian Indian dishes, make breads, such as Pots, Parathe and Indian sweets. Will work five days per week, Wed., Thurs., Fri., Sat., Sun. Mon. and Tues. Off. Will cook for parties in the house.

The only requirement for the position is two years of experience in the job offered.

The CO issued a Notice of Findings on May 19, 1995 (AF 49-53). The CO proposed to deny labor certification on two grounds. First, the CO questioned the Employer's rejection of two U.S. applicants. As such, the Employer was instructed to supply additional documentation regarding its recruitment efforts. Second, the CO questioned whether the job opportunity was permanent, full-time employment. Therefore, the Employer was asked to provide evidence establishing that the position constitutes permanent, full-time employment.

Accordingly, the Employer was notified that it had until June 23, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated June 1, 1995 (AF 63-65), the Employer stated that it spoke to both of the U.S. applicants in question and both were living out-of-state at the time. The Employer further stated that one of the applicants did not know when he would be returning and, as such, no interview was scheduled. Regarding the second applicant, the Employer stated that she would only return for an interview if the Employer would guarantee her the position. Furthermore, the Employer explained that the position is full time and permanent. He noted that his family is constantly entertaining and the applicant will not be required to do anything but the cooking.

The CO issued the Final Determination on June 9, 1995 (AF 66-68), denying certification because the Employer failed to establish that the two U.S. applicants were rejected solely for

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

lawful, job-related reasons. The CO found that the Employer successfully rebutted its finding that the job opportunity was not a permanent, full-time position.

On June 29, 1995, the Employer requested review of the Denial of Labor Certification (AF 77-78). On October 2, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(7) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of a good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

In this case, the CO questioned the Employer's recruitment efforts with regard to two applicants, Mr. Patel and Ms. Sheik (AF 49-53). In his recruitment report, the Employer stated that he sent a letter to Tahira Rafat[2] and she called from Tennessee (AF 42). He further stated that she was not available because she may be moving to Tennessee. The Employer stated that he called Mr. Patel's home and was advised by his family that he is now living in Florida. However, in response to a questionnaire sent by the New York State Department of Labor, both Ms. Sheik and Mr. Patel stated that they were not contacted by the Employer (AF 27, 34). Therefore, the CO, in the NOF, requested that the Employer provide further documentation showing that the applicants were not qualified, willing, or available at the time of the initial referral and consideration (AF 51). Additionally, the CO requested that the Employer document postal or telephonic attempts to contact the applicants.

In rebuttal, the Employer stated that he called the number that Mr. Patel gave on his resume and was told by Mr. Patel's family that he had moved to Florida (AF 64). Therefore, the Employer stated that he left his telephone number. He noted that Mr. Patel returned his call, but an interview was not scheduled because Mr. Patel was not sure when he would be returning. The Employer stated that the applicant never called to schedule an interview and, thus, he believed that Mr. Patel was not interested in the job opportunity. Regarding Ms. Sheik, the Employer stated that she was living in Tennessee when he spoke with her. He further explained that the applicant would not return to New York unless the Employer guaranteed her the job. Because the Employer could not make such a guarantee, the applicant was not interviewed. Finally, the Employer stated that Ms. Sheik was lying when she said that she was never contacted by the Employer.

[2] The Employer apparently meant Ms. Sheik.

Where an employer's statements concerning contact of an applicant during recruitment are contradictory to and unsupported by the applicant's statements, the CO may properly give greater weight to applicant's statements. *Robert B. Fry, Jr.*, 89-INA-6 (Dec. 28, 1989); *Jersey Welding & Fence Co.*, 93-INA-43 (Oct. 13, 1993). As noted above, two U.S. workers in this case independently contradicted the Employer regarding his recruitment efforts. Furthermore, we find it suspect that several key facts regarding the Employer's recruitment efforts were omitted from the Employer's original recruitment report (AF 42, 64). First, the Employer's recruitment report did not state that the Employer actually talked to Mr. Patel while he was in Florida. To the contrary, it only stated that the Employer contacted Mr. Patel's family who informed him that Mr. Patel was living in Florida. Second, the recruitment report makes no mention of the fact that Ms. Sheik would only return for an interview if the Employer would guarantee her the job. Finally, the Employer's recruitment report does not contain any dates indicating when the Employer attempted to contact the applicants or when the applicants contacted him. *Yaron Development Co., Inc.*, 89-INA-178 (Apr. 19, 1991) (*en banc)*, held that a recruitment report must describe the details of the employer's recruitment efforts to be sufficient.

Furthermore, in the NOF, the CO requested that the Employer document postal or telephonic attempts to contact the applicants, including canceled postal receipts or telephone bills (AF 51). However, the Employer offered only undocumented assertions regarding his recruitment of the U.S. applicants (AF 64). The Employer did not offer an explanation as to why it did not submit the additional documentation requested by the CO. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc)*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

Therefore, we find that the Employer has failed to show that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary

to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.